FREQUENTLY ASKED QUESTIONS

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

February 2003

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While this document can be browsed on-line, it is intended to be downloaded and kept as a handy reference document. These questions and answers are current as of December 2004. The Court encourages users to report any errors, inconsistencies, or omissions to the Clerk of Court.

I. Location, Hours, Files, Filing, and Dockets

A. Location and Hours

Where is the Clerk's Office and when can I file my pleadings? The Clerk's Office is located in the E. Barrett Prettyman United States Courthouse at 333 Constitution Avenue, N.W. The public office is on the fifth floor in Room 5423. Filings may be made at the public office between 9:00 a.m. and 4:00 p.m. on regular business days. Additionally, most pleadings may be left in a drop box located at the John Marshall entrance of the Courthouse. Instructions, including size limitations for pleadings to be left in the drop box, are contained in the Court's *Handbook of Practice and Internal Procedures* 10 (2002), and are available at the public counter of the Clerk's Office, and on the Court's web site at www.cadc.uscourts.gov.

What if the public office is closed when I wish to make my filing? The drop box at the John Marshall entrance, mentioned above, is available seven days a week, twenty-four hours a day to deposit

pleadings or briefs. Filings may be time and date-stamped at the United States Marshal's counter located adjacent to the drop box. Counsel should be careful not to leave pleadings intended for the Court of Appeals in the District Court drop box, or *vice versa*, and no emergency, confidential, or sealed materials should be placed in the drop box. *Handbook* at 10.

B. Public Access to Information

What information can I access by telephone? You can obtain selected case information by calling *AVIS (Appellate Voice Information System).* AVIS uses an automated voice response system to read case information directly from the Court's database in response to touch-tone telephone inquiries. To access AVIS, dial 202-273-0926, or 1-800-592-8261. There is no charge for this service.

What information is available on the Internet? The Court's World Wide Web site, at **www.cadc.uscourts.gov,** provides access to a range of information about Court activities, including the Court's argument calendar. Circuit Rules, procedures, opinions, orders, and judgments, and Court forms can be viewed online or downloaded and printed in hard copy. Dockets and case status information are also available to users having a PACER account (see below).

How can I get the status of a case? Docket sheets are available, subject to a "per-page" charge, over the internet via PACER (Public Access to Court Electronic Records). Information on how to obtain a PACER account is available in the Clerk's Office, and on the Court's web site at www.cadc.uscourts.gov.

Can I contact the case administrator? Case administrators respond to telephone inquiries concerning pending cases from approximately 8:30 a.m. to 5:00 p.m. The case administrators do not give advice or provide interpretation of the federal or circuit rules.

C. Court Files and Dockets

Where do I examine and copy Court files? Court files can be obtained at the public counter of the Clerk's Office, Room 5423, from 9:00 a.m. to 4:00 p.m. Monday through Friday. Up to ten copies can be made in the Clerk's Office at a cost of 50¢ per page and can be done while you wait. Anything over ten copies must be sent to the Court's authorized photocopying company and will be processed within 24 hours. You are responsible for payment for copies made by the commercial photocopying company. Current photocopying rates are 20¢ per page and are payable directly to the photocopying company.

How do I obtain copies of documents that have been retired to the Federal Records Center? Documents may be retrieved from the Federal Records Center by calling or writing the Court. You may also request document retrieval at the intake desk in the Clerk's Office (Room 5423). Document retrieval from the Federal Records Center takes ten days to two weeks and costs $45 per case per retrieval. Checks or money orders should be made payable to: Clerk, U.S. Court of Appeals, D.C. Circuit. You are also responsible for paying for photocopying any materials from the retrieved documents. Once again, up to ten copies can be made in the Clerk's Office at a cost of 50¢ per page and can be done while you wait. Anything over ten copies must be sent to the Court's authorized photocopying company and will be processed within 24 hours. You are responsible for payment for copies made by the commercial

photocopying company. Current photocopying rates are 20¢ per page and are payable directly to the photocopying company.

How can I get a copy of the docket in a case? Dockets are available on the internet via PACER. You should note that dockets obtained this way are twenty-four hours old.

Second, dockets may be viewed electronically from a public terminal in the Clerk's Office. Copies of docket sheets or other documents accessed electronically may be purchased at a cost of 10¢ per page. This service is available from 9:00 a.m. to 4:00 p.m.

D. Filing by FAX

Under what circumstances may I file pleadings by FAX machine? Only the Clerk, or the Court, can approve filing by FAX in an emergency. *See* D.C. Cir. Rule 25.

II. Opening the Appeal

A. Review of District Court Orders or Decisions

1. Filing the notice of appeal.

Where do I file my notice of appeal? The notice of appeal is always filed with the Clerk of the District Court. *See* Fed. R. App. P. 3. If you attempt to file the notice of appeal directly with the Court of Appeals, the Clerk of the Court of Appeals will transmit the notice to the Clerk of the District Court for filing. This will add an additional step to processing and result in delay of the appeal.

2. Fees

How much is my docketing fee and where do I pay the fee? The appellate docketing fee is $450. Additionally, the District Court assesses a $5.00 filing fee. Both fees are collected by the Clerk of the District Court when the notice of appeal is filed. Your check should be in the total amount of $455.

What if I want to seek a waiver of the docketing fee? Rule 24 of the Federal Rules of Appellate Procedure sets out the steps a litigant must take to obtain a waiver of fees, that is, to obtain *in forma pauperis* status. Three points are important to remember: (1) the litigant needs to seek *in forma pauperis* status first in the District Court; (2) the Supreme Court has interpreted the statute allowing *in forma pauperis* status to apply only to "natural persons." Therefore, corporations, trusts, partnerships, and organizations cannot have the fees waived; and (3) prisoners seeking *in forma pauperis* status must comply with the requirements of the Prison Litigation Reform Act ("PLRA"), Pub. L. 104-134, 110 Stat. 1321 (1996), *codified in relevant part at* 28 U.S.C. § 1915(a) and (b).

If *in forma pauperis* status is denied by the District Court, the party must either renew the request in the Court of Appeals or pay the $455 fee to the District Court. *See also Handbook* at 24-25.

3. Jurisdiction

What should I remember about jurisdiction before I file my notice of appeal? Always check timing. When was the District Court order or judgment entered and how many days do I have to file my notice of appeal? Rule 4 of the Federal Rules of Appellate Procedure describes the time requirements. Check to make sure that the order or judgment is final and appealable or that it fits within an exception to the

finality requirement. Lastly, make certain which Court of Appeals is the proper Court. For example, some decisions of the District Court are properly appealed only to the United States Court of Appeals for the Federal Circuit.

4. Docketing the notice of appeal

How long will it take for the Court of Appeals to docket my appeal after the notice of appeal is filed in the District Court? This will depend on the workload of both the District Court Clerk's Office and the Court of Appeals Clerk's Office. The federal rules do not set time frames for the transmittal of the notice of appeal to the Court of Appeals or for the docketing of the notice of appeal by the Court of Appeals. Under normal circumstances, however, the District Court will transmit the notice of appeal to the Court of Appeals within seven to ten days of filing. The Court of Appeals dockets every notice filed in a particular month by that month's end.

When do I get a Court of Appeals number for my case? When the notice of appeal is docketed, the Court of Appeals Clerk's Office assigns the appeal a docket number. The first two numbers reflect the year that the appeal was docketed and the remaining four numbers represent the type of case and the sequence of the docketing. For example, Court of Appeals Case No. 03-3002 means that the appeal was docketed in 2003 and that it is the second criminal appeal docketed that year. The "3000" series designates criminal cases; the "5000" series designates appeals where the United States is a party; and the "7000" series designates most other civil appeals from the District Court.

B. Review of Agency Orders or Decisions

1. Filing the petition for review/notice of appeal/application for enforcement

Where do I file my petition for review or notice of appeal challenging an agency decision or order? You will need to check the statute that governs review of the agency's decision. Many agency decisions are directly reviewable in the Court of Appeals. The statute will tell you as well whether the District of Columbia Circuit is the proper circuit in which to seek review. Some agency orders, however, must be reviewed initially by the District Court. If the statute allows for direct review in this Court of Appeals, the petition for review or notice of appeal must be filed with the Clerk of the Court of Appeals. The Clerk will assign a docket number when the petition is filed. In this circuit, the "1000" series designates cases that seek direct review of agency orders or decisions. Thus a case numbered 03-1100 would be the one hundredth agency case docketed in 2003.

2. Fees

How much is my docketing fee and where do I pay the fee? The fee is $450 and should be paid directly to the Clerk of the Court of Appeals. Parties, however, may move the Court of Appeals for leave to file the petition *in forma pauperis*. If leave is granted then the fee is waived, unless the PLRA applies.

3. Jurisdiction

What do I need to remember about jurisdiction? Jurisdiction to review the decision of an agency is granted to the Courts of Appeals by a statute. Remember to find the statute that allows the Court of

Appeals to review your challenge to the agency decision. The statute will ordinarily set out whether the Court of Appeals can review the agency decision, when the petition for review has to be filed (depending on the statute it may be 30, 45, 60, or 90 days from a specified event), and which court or courts of appeal may hear the challenge. An additional aspect to check is whether the statute requires a party to seek rehearing from the agency before a petition for review may be filed in the Court of Appeals. Lastly, this circuit will not ordinarily allow a party to pursue a petition for review when the party is also seeking reconsideration or rehearing before the agency.

C. Extraordinary Writs

1. Filing the petition

What is a petition for an extraordinary writ? Most often this is a petition for writ of mandamus or a petition for writ of prohibition. The filing of such a writ often occurs where there is no final order to review. Examples include petitions for writ of mandamus seeking an order from the Court of Appeals directing an agency to take action on a matter that has been "unreasonably delayed." Other petitions for mandamus seek interlocutory review of District Court orders that ordinarily cannot be reviewed until final judgment, such as discovery orders and orders affecting jury procedures. Orders transferring cases to other jurisdictions also may be reviewable by mandamus.

Where do I file my mandamus petition? If the petition seeks review of a District Court matter or of an agency matter that would upon final order be reviewable in the Court of Appeals, then the petition should probably be filed with the Court of Appeals.

How many pages can the petition be and how many copies must I file? An original and four copies must be filed. The petition, including any supporting memorandum, may be no more than 30 pages. *See* Fed. R. App. P. 21(d).

2. Fees

Is there a fee for filing a petition for writ of mandamus or prohibition? The fee is $450, payable to the Clerk of the Court of Appeals upon filing. Parties, however, may move the Court of Appeals for leave to file the petition *in forma pauperis*. If leave is granted then the fee is waived, unless the PLRA applies.

3. Disposition by the Court

What happens to my petition after I file it? These petitions are treated like motions. That means they are referred to the staff attorneys in the Legal Division of the Clerk's Office for presentation to the Court's Special Panel. They are given special priority in the Legal Division and are promptly presented to the Special Panel. Ordinarily, a staff attorney will prepare a memorandum discussing the law and facts pertinent to the disposition of the petition for a writ of mandamus and recommend one of three dispositions: (1) that the petition be denied without a response; (2) that a response be ordered and disposition deferred pending receipt of the response; or (3) that a response be ordered and that the petition and response be calendared for oral argument. Most petitions for extraordinary writs are denied by the Special Panel either after consideration of the petition alone, or after consideration of the petition and the response.

III. Initial Submissions

What happens after my notice of appeal or petition for review is docketed? The Clerk's Office will issue an order requiring you to file certain documents, called "initial submissions," within 30 days. The order will also set a 30-day deadline for the filing of procedural motions and requests to enter mediation, and a 45-day deadline for the filing of dispositive motions. *See Handbook* at 21, 28.

What are the "initial submissions" and what are they used for? The initial submissions are described more particularly below. Basically, however, initial submissions provide information to assist the Court's processing of the case. In an appeal from a District Court decision, the appellant will be ordered to provide the following initial submissions: (1) a report certifying that transcripts have been prepared or ordered; (2) a docketing statement on a form provided by the Court; (3) an entry of appearance form; (4) two copies of the underlying decision; (5) a statement of the issues to be raised on appeal; (6) a certificate of counsel as required by D.C. Cir. Rule 28(a)(1) setting out the parties and other participants, rulings below, and related cases; (7) a corporate disclosure statement as required by D.C. Cir. Rule 26.1, and (8) a statement whether or not a deferred appendix, *see* Fed. R. App. P. 30(c), will be utilized. Appellee is required to provide a certificate of counsel and an entry of appearance form as well.

The parties will be asked to provide the same information in agency cases, with three exceptions. First, no report as to the preparation of transcripts is required. Second, the respondent agency will be ordered to file the certified index to the agency record within 45 days of the issuance of the initial submissions order. Third, no entry of appearance form for petitioner/appellant is required.

When do I file my brief? Unlike most other circuits, the D.C. Circuit does not require briefs to be filed until the parties receive an order from the Court setting an appropriate briefing schedule. This does not mean that a party may not file a brief early, but it does mean that a party is not required to file a brief until the Court sets a schedule. More details are set out below.

A. Transcripts

What should I know about preparation of the transcripts? There are a number of important points to remember. First, it is appellant's responsibility to arrange in the District Court for the preparation of the transcripts. The arrangements should be made immediately once the appeal is filed. The appeal cannot go forward until the necessary transcripts are completed. **It is especially important to take steps to have transcripts in criminal cases prepared expeditiously. The Court will not tolerate delays in the ordering and preparation of transcripts in criminal cases.**

What should I do if there is a problem with the Court reporter? Inform the Clerk of the Court of Appeals, in writing, as soon as any problem arises. The Clerk will attempt to resolve informally any problem. If informal resolution is not possible, the Clerk will present the problem to the Chief Judge or a panel of the Court of Appeals for formal resolution.

B. Docketing Statement

What is the Docketing Statement and what is it used for? The docketing statement is a form, asking for information about the case, which is sent to appellant or petitioner when the appeal is docketed--except

in criminal cases, where it is given to the appellant in the District Court when the appeal is filed. The docketing statement is used by Court personnel to process the appeal. The information provided enables the Court to identify appeals that must be expedited, to identify related cases, and to confirm information contained on the District Court docket, or in the petition for review. *See Handbook* at 21.

C. Statement of Issues

What is the statement of issues and what is it used for? The statement of issues is a non-binding preliminary statement by the appellant or petitioner as to what issues will be raised on appeal. It is used primarily by the Clerk's Office to help determine whether an appeal should be calendared for argument or decided on the briefs without argument pursuant to D.C. Cir. Rule 34(j).

D. Entry of Appearance

What is the Entry of Appearance Form? The Clerk sends this form to counsel when the appeal is docketed. The Court uses it to designate the official counsel of record in the case. Failure to return this form may result in counsel not receiving orders issued by the Court.

E. Certificate of Counsel

What is the certificate of counsel and why do I have to file it more than once? The certificate of counsel, required by D.C. Cir. Rule 28(a)(1), is often filed three times. First, with the initial submissions, second, with the parties' briefs, and third, with any petition for rehearing or rehearing en banc. The certificate requires a list of "all parties, intervenors, and amici who have appeared before the District Court

or agency...and all persons who are parties, intervenors or amici in this Court." If the case involves an agency rulemaking, however, it is not necessary to set forth every party who submitted comments to the agency. The certificate also requires the party to identify the ruling(s) under review and any prior or related cases.

The certificate of counsel serves several purposes. It is the primary tool for identifying cases in which judges are disqualified from sitting. Because judges often rule on matters before a brief is submitted, the Court must have, early on, a way of identifying persons or entities that could cause judges to recuse themselves. Additionally, cases are assigned to judges on the argument calendar, in most instances, before the briefs are filed. The statement is required to be repeated in the briefs, so that judges may make another check as to possible disqualifications before they begin work on the appeal.

The staff attorneys in the Legal Division use the rest of the information provided in the certificate of counsel to aid in their screening of the case. For example, if counsel identifies a related case raising an identical legal issue, the staff attorney may recommend that the cases be grouped together or that consideration of the later case be held in abeyance. The judges may also use the information provided as they prepare the case for argument and disposition.

F. Corporate Disclosure Statement

What is the corporate disclosure statement and why do I have to file it more than once? Circuit Rule 26.1 requires corporations, associations, joint ventures, partnerships, syndicates, or other similar entities appearing before the Court to file a disclosure statement that identifies all parent companies and any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares)

in the entity. To assist the members of the Court in identifying possible recusals at all appropriate stages of the appellate proceedings, the corporate disclosure statement must be submitted at the times specified in FRAP 26.1, and Circuit Rules 5, 8, 12, 15, 18, 21, 27, and 35. A revised corporate disclosure statement must also be filed anytime there is a change in corporate ownership interest that would affect the disclosures required by Circuit Rule 26.1. *See Handbook* at 22.

G. Use of the Deferred Appendix

What is a deferred appendix and why do I have to tell the Court in my initial submissions whether or not I will use one? Counsel should review Fed. R. App. P. 30(c). Ordinarily, the appendix is filed with the appellant's or petitioner's opening brief. Sometimes it is more convenient for the parties, however, to defer filing the appendix until after the briefs are filed. This enables counsel to assemble a more complete and possibly more concise appendix because counsel will know from the briefs what materials the Court will need to consider. If a deferred appendix is used, the parties file preliminary briefs that omit appendix references. After the deferred appendix is filed, the parties submit final briefs containing the appendix references. *See Handbook* at 44-45.

The Court asks for early notice of the parties' intentions with respect to the deferred appendix mainly to eliminate the need for counsel to prepare and for the Court to process motions for leave to utilize a deferred appendix.

Whether the appendix is filed with petitioner/appellant's brief or whether it is deferred, the appendix pages must be consecutively numbered. Counsel and parties are also reminded that if any party causes the inclusion of unnecessary material in the appendix, the Court may require that party to bear the cost of

reproducing the appendix, and/or may impose an appropriate sanction.

IV. Motions Practice

A. Procedural Motions

What is a procedural motion? Any motion that does not have the potential of disposing of the case in whole or in part is considered a procedural motion. Examples include motions to consolidate, to intervene, to participate as amicus, to stay, to hold in abeyance, and to appoint counsel.

1. Timing

When do I file my procedural motion? Under this Court's case management plan, most procedural motions must be filed within 30 days of the docketing of the appeal. The initial submissions order will ordinarily set out the date by which procedural motions must be filed. One exception is motions for leave to participate as amicus curiae, which the court allows to be filed within 60 days of the docketing of the appeal. Finally, Rule 15(d) of the Federal Rules of Appellate Procedure requires that motions to intervene be filed within 30 days of the filing of the petition for review.

What if I cannot file my procedural motion within 30 days of the filing or the docketing of the appeal or petition for review? The Court recognizes that certain motions cannot be filed within 30 days of docketing the appeal. An event affecting the appeal may occur outside of the 30-day window. For example, the Supreme Court could decide to review a case raising the same issue as a pending case. This Court would consider a motion to hold consideration of the pending case in abeyance even though it was

filed outside the 30-day window. Additionally, the Court considers late-filed motions where the movant can demonstrate good cause for not filing within the 30-day window.

2. Formal requirements

In what format should I file my procedural motion? The formal requirements for most motions are described in Fed. R. App. P. 27 and D.C. Cir. Rule 27. Counsel should keep three requirements in mind: (1) the motion may not exceed 20 pages; (2) the motion and any memorandum in support must be combined in one document; and (3) the Court neither requires nor uses proposed orders. The Court requires an original and four copies of every motion. *See Handbook* at 28-30.

3. Disposition by Clerk's order

When will the Clerk's Office review and decide my procedural motion? The Clerk's Office has been delegated the power to review and dispose of only certain types of motions. The Clerk's Office may grant unopposed motions such as motions to consolidate, to hold in abeyance, to intervene, and to participate as an amicus. If a procedural motion is opposed, it will ordinarily be decided by a panel of judges, although the Clerk has authority to grant some procedural motions even if opposed. Additionally, certain procedural motions, such as motions to expedite, motions for appointment of counsel, motions to stay District Court or agency orders, and motions to exceed the page, word, or line limits are decided by a panel of judges. Finally, the Clerk retains the discretion to submit any procedural motion to a panel of judges in an appropriate circumstance.

Note that the rules do not require the Clerk to wait for an opposition to dispose of a procedural

motion, though ordinarily in this Circuit the Clerk will endeavor to find out whether the motion is unopposed. Aggrieved parties may seek reconsideration of Clerk's orders. Motions for reconsideration are referred to the Special Panel.

How long will it take for the Clerk's Office to dispose of my motion? Except for motions to intervene, the Clerk's Office endeavors to grant procedural motions shortly after it can be determined that the motion is unopposed. Usually this will be within five days after that determination is made.

Motions to intervene are treated differently in that they are often granted as a group ten days after the time for filing such motions has passed, which would be about forty days after the petition for review is filed.

4. Disposition by judges

What happens if my procedural motion must be decided by a panel of the Court? If the procedural motion, other than a request for the appointment of counsel by a *pro se* litigant, is filed before the case is set for argument, briefing will be deferred until the procedural motion is resolved. The motion will be referred to the Legal Division of the Clerk's Office where it will be assigned to a staff attorney. The staff attorney will recommend a disposition to a Special Panel.

How long will it take for the Special Panel to decide my procedural motion? This will depend on the nature of the motion and the workload in the Legal Division. Certain procedural motions are given priority; these include motions to expedite, motions to stay District Court or agency orders, and motions

to hold in abeyance. Most procedural motions are resolved within 30 days of the filing of the opposition or the reply to the opposition.

5. Particular motions

Are there special points I should be aware of with respect to particular motions? Yes.

Motions to intervene. If several cases are consolidated on appeal, a movant for intervention need file in only one case; the motion serves as a request to intervene in each consolidated case. If the motion is granted, the movant automatically becomes an intervenor in each consolidated case. It is a waste of time and resources, and will delay the processing of the appeal, if duplicate motions for intervention are filed in consolidated cases. *See Handbook* at 17.

Movants for intervention should be aware that this Circuit ordinarily requires movants to demonstrate Article III standing as a condition of intervention.

Motions to consolidate. The Court attempts to identify cases that arise from the same agency or District Court proceeding and consolidate such appeals on its own motion. Parties, however, should not rely on the Court's efforts. Instead, parties ought to seek consolidation by motion where appropriate. *See Handbook* at 23.

Motions to hold in abeyance. These are motions to defer appellate consideration pending the occurrence of another event. Most commonly motions to hold in abeyance are appropriate when the parties are attempting to settle the dispute or when the result of a related Court or agency proceeding will

substantially affect or even moot the appeal. Absent exceptional circumstances, a direct criminal appeal will not be held in abeyance pending a post-conviction proceeding in the District Court. *See* D.C. Cir. Rule 47.5.

Motions to expedite. Motions to expedite are given priority and presented to the Special Panel by the staff attorneys in the Legal Division as soon as all the pleadings have been filed. In this circuit parties seeking expedition, where expedition is not required by statute, must show both that there is a substantial likelihood that the movant will prevail on the merits of the appeal and that, absent expedition, the movant will suffer irreparable harm. The Court may also grant expedition where the movant can show that the public in general has a substantial interest in quick resolution of the appeal. *See Handbook* at 33-34.

Motions for extension of time. Because briefing schedules are keyed to the oral argument date, requests for extensions of time after an appeal is calendared are highly disfavored. *See Handbook* at 36-37. The Court, by local rule, has imposed a fairly comprehensive set of requirements on movants who seek additional time to comply with a deadline. *See* D.C. Cir. Rules 27(h) and 28(f). For example, a motion for leave to file out of time an opposition to a motion must be filed at least three calendar days before the opposition is due, otherwise the motion for leave to file out of time must be accompanied by a motion for leave to file the motion for leave out of time. The lead time will vary depending on the type of extension sought. Parties should consult the rules carefully. Additionally, the rules require that the moving party seek the views of the other party and represent those views in the motion or describe the efforts made to obtain those views. The rules also encourage personal service of such motions and generally require the most

expeditious form of service."

Motions to exceed the page (or word) limits. The Court limits briefs by the number of pages, words, or lines contained in the brief. All other pleadings, including motions, petitions for rehearing, and answers to orders to show cause, have page limits imposed by rule or by order. The Clerk has no authority to grant a motion to exceed the page or word limits. All such motions, without exception, may only be granted by the judges of the Court. Once again, counsel should consult D.C. Cir. Rules 27 and 28, and the *Handbook* at 29-30, 39-40, before filing such a motion or any response to such a motion. **The Court looks upon motions to exceed the page or word limits with extreme disfavor. Such motions are rarely granted.**

B. Dispositive Motions

What is a dispositive motion? Any motion that will terminate in whole or in part this Court's consideration of an appeal or petition for review is a dispositive motion. Examples include motions for summary affirmance, motions to dismiss, motions for remand, and motions to transfer. A motion to dismiss in part or to summarily affirm in part is considered a dispositive motion.

1. Timing

When should my dispositive motion be filed? D.C. Cir. Rule 27(g) requires that all dispositive motions, with one exception, be filed within 45 days of the docketing of the case in this Court. The exception provides that appellants or petitioners may move to dismiss their own cases at any time. The 45-

day requirement is imposed to allow the Court to dispose of such motions early in the appeal. This saves the resources of both the Court and the litigants. Appeals that are amenable to dispositive motions can be dealt with before the parties and Court needlessly expend energy preparing, filing, and processing briefs.

What if I cannot file my dispositive motion within 45 days of docketing the appeal? D.C. Cir. Rule 27(g)(1) allows for the filing of motions for voluntary dismissal by the appellant or the petitioner at any time. All other motions filed outside of the 45-day window must be accompanied by a motion for leave to file the dispositive motion. The motion must demonstrate good cause for the untimely filing. The Court most often recognizes good cause for late filing where the motion could not have been filed sooner because the motion relies on an occurrence outside the 45-day window.

If I file a dispositive motion will I also have to file a brief? If a dispositive motion is filed by any party within 45 days of the docketing of the case, briefing is deferred unless the Court orders otherwise. A dispositive motion filed outside of the 45-day period will not necessarily defer the briefing of the appeal. If, for example, an appellant submits a motion to remand three days before the appellant's brief is due, appellant must still file a brief, even if the motion for remand has not been decided. Therefore, any late-filed dispositive motion should be accompanied by a motion to defer briefing if the movant wishes to avoid filing a brief. Motions to defer are not routinely granted.

2. Formal requirements

What is the format for my dispositive motion? The formal requirements for most motions are described in FRAP 27 and D.C. Cir. Rule 27. Counsel should keep three requirements in mind: (1) the motion may not exceed 20 pages; (2) the motion and any memorandum in support must be combined in one document; and (3) the Court neither requires nor uses proposed orders. The Court requires an original and four copies of all motions. *See Handbook* at 28-29.

3. Disposition by Clerk's order

When will the Clerk's Office review and decide my dispositive motion and how long will it take? The Clerk's Office may grant routine motions, filed by appellants or petitioners, for voluntary dismissal of their own cases. The Clerk's Office may also grant routine unopposed motions to transfer cases to other circuits or for voluntary remand to the district court or agency. The Clerk retains the discretion to refer any of these motions to the judges for disposition. Ordinarily the Clerk will attempt to ascertain whether an opposition will be filed before ruling on the motions described above.

Routine unopposed motions to voluntarily dismiss appeals, to transfer appeals, and for voluntary remand, are ordinarily granted by Clerk's order within five days of the determination that such motion is unopposed.

A final point to remember is that an appellant's failure to respond to a dispositive motion may, after proper notice, result in dismissal of the appeal for lack of prosecution.

4. Disposition by judges

How long will it take for the judges of the Special Panel to decide my dispositive motion? All

dispositive motions except those described above must be decided by a panel of judges. The time between filing and disposition will depend on the nature of the motion and the workload in the Legal Division. All dispositive motions are presented to the Court within 60 days of the filing of the reply to the opposition.

5. Particular motions

Motions for summary affirmance. A motion for summary affirmance should be filed when the appeal presents no issues of first impression, the facts are relatively uncomplicated, and oral argument is unlikely to add significantly to the decisional process. It is very unlikely that the Court will grant summary affirmance if the appeal involves an issue of first impression or if this Court would have to choose between conflicting circuit decisions.

Motions for summary reversal. The Court grants very few motions for summary reversal. Such motions are appropriate where intervening Supreme Court or D.C. Circuit Court of Appeals decisions render the District Court or agency disposition incorrect. Such motions are almost always inappropriate in other circumstances.

Motions to dismiss. Motions to dismiss should be filed where the Court's power to decide an appeal is in question. If the order under review is not a final order, if the appellant or petitioner lacks standing to challenge the order under review, if the appeal or petition for review was filed out-of-time, if the appeal is moot, or if this Court has no statutory authority to review the order appealed, then a motion to dismiss is appropriate. If the jurisdictional question is particularly difficult, parties may wait and raise the question in

their briefs. In other words, a jurisdictional argument is not waived if it is not raised in a motion within 45 days of the filing of the appeal.

A motion to dismiss, unless the appeal is legally frivolous, is not the proper vehicle to argue the merits of the agency or District Court order. Such arguments should be made in a motion for summary affirmance.

Motions to remand. A motion to remand is often filed when further proceedings before the District Court or the agency are appropriate. Counsel should be aware of the distinction between a remand of the record and a remand of the case. A remand of the record is most appropriate when the District Court or agency needs to supplement the record with additional fact-finding. Where only the record is remanded, the Court of Appeals retains jurisdiction and the District Court or agency may not change its ultimate disposition. If the Court of Appeals remands the entire case, it relinquishes jurisdiction and the District Court or the agency is free to reconsider its disposition in light of whatever instructions may accompany the remand. *See Handbook* at 35.

Motions to voluntarily dismiss direct criminal appeals. To protect appellants in direct criminal appeals, the Court's *Handbook of Practice and Internal Procedures* sets out on page 34 the following requirement:

> The motion must be accompanied by an affidavit from the appellant, stating that the appellant has been fully informed of the circumstances of the case and of the consequences of a dismissal, and wishes to dismiss the appeal. The affidavit also must

recite the appellant's satisfaction with the services of counsel.

C. Emergency Motions

What is an emergency motion? Emergency motions are those motions that seek relief from the Court on an expedited basis, usually to forestall the effective date of an agency or District Court order. The most common emergency motions are motions to stay District Court or agency orders or agency rules, or motions to enjoin specified action by a party or parties pending disposition of the appeal. An emergency motion will usually contain an allegation of irreparable harm that the movant is suffering or will begin to suffer on a date certain. *See Handbook* at 32-33.

1. Timing

When should I file my emergency motion? Emergency motions should be filed as soon as practicable once the appeal has been filed or the petition for review docketed. Counsel should be aware that the Court may judge the urgency of the motion by considering the diligence of counsel in pursuing the appeal as well as the emergency relief. Counsel should also note that Rules 8 and 18 of the Federal Rules of Appellate Procedure and D.C. Cir. Rules 8(a) and 18 require the movant first to seek a stay or injunction from the District Court or agency. This Court may defer ruling on an emergency motion pending an initial ruling by the District Court or agency.

2. Procedures

Are there special procedures I should follow when filing an emergency motion? Counsel should

consult Rules 8, 18, and 27 of both the Federal Rules of Appellate Procedure and the local rules. Counsel should also consult the relevant portion of the Court's *Handbook*. Counsel should call to give the Clerk's Office advance notice of the filing of an emergency motion, whether or not counsel is certain that the motion will be filed, especially if very quick judicial action may be necessary. Counsel should clearly state at the beginning of the motion when action is needed and why. Arbitrary dates with no explanation are of little help to the Court.

Counsel should consult the relevant case law and make certain that all four factors listed in D.C. Circuit Rules 8 and 18 are discussed: (i) the likelihood of success on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest.

3. Formal requirements

What are the formal requirements for a motion for emergency relief? The formal requirements for most motions are described in Federal and D.C. Circuit Rule 27. Counsel should keep three requirements in mind: (1) the motion may not exceed 20 pages; (2) the motion and any memorandum in support must be combined in one document; and (3) the Court neither requires nor uses proposed orders. The Court requires an original and four copies of every motion. The motion should also be clearly labeled as an "emergency" motion.

4. Disposition by judges

How long will it take the Court to decide my emergency motion? An emergency motion is

immediately routed to the Legal Division of the Clerk's Office, where it is assigned to a staff attorney. The staff attorney will review the motion and discuss a course of action with his or her supervisor. If appropriate, the staff attorney will promptly contact the judges of the Special Panel to discuss the emergency. Depending on time constraints, the staff attorney will either brief the Special Panel orally or prepare a written recommendation. The Special Panel may decide to order an expedited response. The Special Panel may also, in appropriate circumstances, issue an "administrative stay" to allow sufficient time to brief and consider the matters presented in the request for emergency relief. This process will be tailored to the urgency of the request presented to the Court. The Court makes every attempt to dispose of emergency motions within the legitimate time limits set out by the movant.

D. Motions filed after the appeal is calendared

1. Timing

Will the Court consider motions filed after my case is calendared for oral argument? The Court's case management plan is designed to encourage the filing and disposition of motions before cases are calendared for argument. Occasionally, however, it is necessary and appropriate to file motions after argument is scheduled. Unless the motion seeks voluntary dismissal, or is directly related to briefing and argument (such as a motion to exceed the word limits or a motion to dismiss for failure to file a brief), it should be accompanied by a motion for leave to file the motion out of time. The motion for leave should explain why the motion was not filed within the 30-day window for procedural motions or the 45-day window for dispositive motions.

2. Disposition by Clerk

Which motions filed after my case is calendared will be disposed of by the Clerk? Once the appeal is calendared, the Clerk's authority to rule on motions is very limited. Nearly all motions will go either to the presiding judge of the panel or to the entire panel.

3. Disposition by Judges

What procedure is followed when my motion is referred to the presiding judge or the panel to decide? The presiding judge decides certain procedural motions, such as motions for extensions of time, motions to postpone argument, and motions for extension of the word limits. The presiding judge in his or her discretion may rule on the motion, refer the motion to the full panel for disposition, or refer the motion to the Legal Division of the Clerk's Office for a recommendation. Other motions are generally sent to the Legal Division, which prepares a recommendation for the merits panel scheduled to hear argument in the case.

E. The Special Panel

What is the Special Panel? The Special Panel is a panel that is always on duty to hear emergencies; decide motions; and dispose of cases without argument, pursuant to D.C. Cir. Rule 34(j). Each active judge on the Court serves on the Special Panel for up to three months during the term and six weeks during the summer. Most of the recommendations made by the staff attorneys of the Legal Division of the Clerk's Office are presented to the Special Panel.

V. Screening and Calendaring the Appeal

A. Screening

How are appeals and petitions for review screened in the D.C. Circuit? In civil cases, a package of materials that includes the initial submissions and the District Court docket entries are sent to the Legal Division after the initial submissions are filed and any motions filed have been decided. A staff attorney will review the material, checking to see whether jurisdiction is proper and whether there are related cases. If jurisdiction is proper and there is no reason why consideration of the case should be held in abeyance, the staff attorney will then make an initial determination whether the appeal should be decided with or without oral argument. Of course, the final determination whether or not argument is appropriate will be made by the judges.

Direct criminal appeals are treated differently. In most instances the Clerk's Office will issue a briefing schedule once the transcripts necessary for the appeal have been completed. The Legal Division will wait until appellant's brief is filed, and often until appellee's brief is filed, to screen the case. This is necessary because the nature of the appeal will often not be apparent until the briefs have been filed.

1. Screening designations

a. Rule 34(j) cases

How do I know whether my case will be screened for disposition without argument pursuant to D.C. Cir. Rule 34(j)? If it appears that oral argument is unlikely to aid the Court significantly in deciding the appeal, the appeal will be screened for potential disposition without argument. *See Handbook* at 48-49. Uncomplicated appeals presenting issues that have been authoritatively decided by this Court are most

often appropriate for disposition without argument. Many pro se appeals and some direct criminal appeals are appropriate for disposition without argument.

What happens if my case is screened for possible disposition without argument? Can I object?

When the staff attorney screens the case for disposition without argument, the Clerk's Office issues a briefing schedule that states the appeal "*may* fall within the intent and purpose of Rule 34(j)." The order goes on to note that "[t]his notice does not preclude the Court, after examination of the briefs, from setting this case for oral argument." The order signifies only that a staff determination has been made that the appeal can be decided without oral argument. No judicial determination has been made and no objection is appropriate at this point.

After briefing is complete, unless it appears that rescreening by the Director of the Legal Division is appropriate, a staff attorney will prepare a written memorandum and a proposed disposition for presentation to a Special Panel. If the Special Panel agrees to decide the case without argument, the parties will receive a notice including the names of the judges who made the decision. At this point, parties may seek reconsideration of the decision to dispose of the case without oral argument. Such reconsideration is rarely granted. About two weeks after the parties receive notice that the appeal will be decided without oral argument, the Court will issue the appropriate judgment or order disposing of the appeal. The determination to decide a case without oral argument must be unanimous.

If the Special Panel determines that an appeal screened by staff for disposition without argument ought to be scheduled for argument, the parties will receive an order placing the case on the argument calendar.

b. Regular merits

What happens if my case is screened for disposition after argument? If, after review, a staff attorney determines that an appeal is appropriately placed on the argument calendar, the appeal is designated as appropriate for disposition by a regular merits panel. The appeal will then be assigned an oral argument date. The briefing schedule will be keyed to the argument date and the last brief will ordinarily be due at least 50 days prior to oral argument. Once the briefs have been filed, the judges on the regular merits panel may determine that oral argument is unnecessary to the disposition of the appeal. In that event, a notice will issue informing the parties that the appeal will be decided without argument.

c. Complex cases

What happens if my appeal is identified as a "complex" appeal? As many as six or more appeals each year are designated "complex" cases. *See Handbook* at 8, 23-24. These cases usually involve large numbers of parties, many issues, and enormous agency or District Court records. Often the Court permits several petitioners' or appellants' briefs. In many instances the usual page or word limits are expanded. These appeals, once identified, are managed in the Legal Division. The Legal Division attempts to put together, with the aid of the parties, a briefing format that results in the most efficient and concise presentation possible. The parties' input may be sought through written comments on proposed briefing formats or through face-to-face meetings between Court staff and lead counsel.

Ordinarily, early in the process, a "select panel" is randomly assigned to the case for all purposes through final disposition. Sometimes, however, when there are numerous "complex" cases simultaneously pending before the Court, the Special Panel will approve a briefing format. The select panel that will decide

the merits will be constituted later, as earlier pending "complex" cases are terminated.

2. Screening for mediation

Will my case be referred to the Court's Alternative Dispute Resolution Program for mediation? Cases are selected for referral to the Court's Mediation Program by the supervisory staff of the Legal Division and the Director of Dispute Resolution in the Circuit Executive's Office. Many factors are considered, including the issues, the parties, and the nature of the case. In addition, litigants may request mediation by writing to the Clerk's Office or by submitting the "Request for Mediation" form which may be found on the Court's web site and which is included among the materials mailed to the litigants after the docketing of the appeal. **These requests are confidential and need not be served upon other parties to the appeal.** None of the factors considered by the Court's staff in determining whether a case is appropriate for mediation, including a request for mediation, is dispositive; and none will, by itself, preclude or compel referral to the mediation program.

B. Calendaring

1. Timing

How soon after my case is screened will it be calendared? The interval between screening and the argument date will depend on the Court's caseload at any given time. The argument date will often be between nine and twelve months from the date that the appeal or petition for review was docketed. Notice of the argument date should be received considerably sooner as the briefing schedule will usually be set out in the same order that schedules oral argument.

2. Mechanics

How are the date and panel selected for my appeal? The Court generally establishes a sitting schedule in January that covers the upcoming September to May term. The Court schedules only emergency oral arguments in June, July, and August. The sitting schedule is randomly generated and provides for each judge to sit with each other judge at least three times.

A computer program randomly assigns cases to the panels. As the cases are screened, they enter a queue with the oldest cases at the front of the line. The Calendar Clerk enters the case numbers into a program which assigns the case to the first available date after checking three things. First, the program will calculate the amount of time needed to brief the appeal and only select a date that fits the calculation. Second, the program will skip over any panels where a judge is disqualified from sitting on the particular case. Finally, the program will check the case mix. For example, if two Environmental Protection Agency cases are already scheduled for one panel and the Calendar Clerk enters a third EPA case into the program, the program will skip that week and look for another week with no more than one EPA case.

VI. Briefing the Appeal

A. Entering the briefing schedule

1. Rule 34(j) cases

When will I get my briefing schedule if my case is screened for possible disposition without oral argument pursuant to D.C. Cir. Rule 34(j)? The screening decision is normally made after the Court has received initial submissions and after all motions have been resolved. Once the Legal Division identifies

the case as a potential candidate for Rule 34(j) treatment, the Clerk's Office issues a briefing schedule allowing appellant or petitioner at least 40 days to file the opening brief.

2. Regular merits cases

When will I get my briefing schedule if my case is screened for disposition after argument? The briefing schedule will be set out in the same order that schedules the argument date. Briefing is keyed to the date of argument and the last brief in the case ordinarily will be due at least 50 days before argument. Unless the appeal has been expedited, the first brief will be due no fewer than 40 days after the order establishing briefing has issued.

What if I need more time than allotted to file my brief? Because briefing is keyed to the date of oral argument, motions to extend time are disfavored and rarely granted. Counsel should make such motions only if supported by extraordinarily good cause. *See Handbook* at 36-37.

3. Multi-party and "Complex" cases

How is briefing handled in "Complex" and other multi-party cases? Where there is a prospect of multiple briefs, the Court, through the Legal Division of the Clerk's Office, will intervene when the case or cases are being screened. Most often an order to show cause will issue soliciting comments on a proposed briefing schedule that requires parties to file joint briefs, or limits the length of briefs. If the parties agree to the format or propose a reasonable alternative format, the briefing schedule may be adopted in a Clerk's order and the case scheduled for argument. If the parties seek relief from the length limits for their briefs,

or do not agree with (and propose no reasonable alternative to) the proposed format, the comments are presented to judges to determine the format. *See Handbook* at 23-24.

In "complex" cases, the format is always considered and adopted by a panel of the Court.

B. Formal Requirements

1. Word Limits

How long may my brief be? Counsel should read Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a) carefully. Principal briefs of appellants/petitioners/appellees/respondents may not exceed 14,000 words if prepared by a word processing system that counts words. Reply briefs of petitioners or appellants may not exceed 7,000 words. Briefs of intervenors may not exceed 8,750 words and reply briefs of intervenors may not exceed half that amount.

Parties may rely on the word counts reported by their word processing systems provided that footnotes and citations are included in such word counts. Each brief must contain a certificate from the counsel of record or party stating the number of words or lines.

What if I my word processing system does not count the words in my brief? Fed. R. App. P. 32(a)(7)(A) sets out page limits for parties who cannot rely on a word count. Principal briefs may not exceed 30 pages; petitioner or appellant reply briefs may not exceed 25 pages.

2. Form of briefs

What should be the form of my brief? Rule 32 of the Federal Rules of Appellate Procedure and of the

D.C. Circuit's local rules govern the form of briefs. Counsel should remember that all briefs must be bound and that each type of brief is assigned a color for its cover. Briefs of appellants or petitioners must have a blue cover. Briefs of appellees or respondents must have a red cover. Briefs of intervenors or amici must have a green cover. Reply briefs must have a gray cover, supplemental briefs a tan cover, and appendices a white cover.

Rule 32 also sets out the information that must be printed on each cover.

3. Number of Copies

How many copies of my brief do I file? D.C. Cir. Rule 31 sets out this requirement. *See also Handbook* at 38-39. In most instances parties must file an original and 14 copies of every brief. If the parties are using a deferred appendix, however, 7 copies of the initial briefs are filed without appendix references, followed by an original and 14 copies of the final briefs that include the appendix references. If a party is proceeding *in forma pauperis,* only one copy of the brief need be filed. The Clerk's Office will make the additional copies.

4. Deferred Appendix

What is a deferred appendix and when is it used? Counsel should read Rule 30 of the Federal Rules of Appellate Procedure and D.C. Cir. Rule 30 for all questions concerning the appendix. *See also Handbook* at 43-45. The use of a deferred appendix is discussed in Federal Rule 30(c). A deferred appendix is filed after the principal briefs are filed, instead of with the appellant's or petitioner's brief. When the appendix is deferred the parties must file two sets of briefs. The first set of preliminary briefs

does not include references to the appendix. The second set of "final" briefs adds the appendix references.

The Court does not limit the use of the deferred appendix. It is most useful, however, in appeals that involve large complicated records. In those cases a deferred appendix allows the parties additional time for preparation of the appendix and allows the parties to submit a more concise appendix based on the matters actually contained in the briefs.

5. Contents

What must be in my brief besides my argument? Rule 28 of the Federal Rules of Appellate Procedure sets out items that must be included in the briefs. D.C. Rule 28(a) adds more items that must be included. Three particular items should be pointed out. This Circuit requires a glossary when the brief contains abbreviations and acronyms, and this Circuit requires a summary of argument in **every brief filed**. Additionally, the table of authorities must identify with an asterisk those authorities chiefly relied on. *See Handbook* at 40-42.

Do the items required by the Federal and D.C. Cir. Rules count towards my word limits? Some items are excluded. Under Fed. R. App. P. 32(a)(7)(B)(iii), the corporate disclosure statement, table of contents, table of citations, the statement with respect to oral argument, the certificates of counsel, and any addenda of statutes or regulations are not counted toward the word limitation. In addition, D.C. Cir. Rule 32(a)(2) excludes the certificate required by Circuit Rule 28(a)(1) and the glossary.

May I cite unpublished opinions in my brief? Unpublished dispositions of this Court issued *before*

January 1, 2002, may not be cited for their precedential effect. They may be cited, however, when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant. Unpublished dispositions of this Court (not including sealed opinions) issued *on or after* January 1, 2002, may be cited as precedent. However, a panel's decision to issue an unpublished disposition means the panel sees no precedential value in that disposition. Unpublished dispositions of other courts may be cited when the binding or preclusive effect of the disposition is relevant. Unpublished dispositions of other courts of appeals may also be cited under the circumstances and for the purposes permitted by the issuing court. See D.C. Cir. Rules 28(c) and 36(c), Handbook at 41-42. .

6. Briefs filed under seal

What if I must refer to sealed matters in my brief? Counsel should read D.C. Cir. Rule 47.1 carefully. If counsel must refer to sealed materials in the brief or include sealed materials in the appendix, then two sets of briefs or appendices must be filed. A complete brief including the confidential materials is submitted under seal. A second "public brief" that deletes the confidential material is also submitted. The same procedures should be followed for appendices containing sealed materials.

C. Particular Parties

1. Intervenors

What is the role of intervenors? Are there limitations on participation? Generally, intervenors are only allowed to amplify the arguments of the party the intervenor supports and may not raise additional issues or make additional challenges not made by the petitioner or appellant. If the intervenor wishes to

make a challenge that a petitioner will not make, the intervenor must file its own petition for review.

Intervention is often governed by statute in agency cases. Counsel should consult the statute governing review of the particular order to determine if and how intervention may be had. Absent statutory guidance, the Court will look to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure. Counsel should also be aware that this circuit ordinarily requires that intervenors demonstrate Article III standing.

Intervenors are sometimes allowed limited participation in oral argument.

2. Amicus Curiae

What is the role of amicus curiae? Are there limits on participation? Amicus curiae should not merely repeat the arguments of the party it supports. Rather, the participation of an amicus curiae should provide the Court an additional perspective that expands on points addressed in the principal briefs.

The Court requires that amicus curiae file a notice of participation or a motion for leave to participate within 60 days of the docketing of the appeal. This requirement does not apply to the United States or to individual states. The Court will ordinarily deny leave to participate as an amicus curiae if participation would cause the recusal of a member of the panel scheduled to decide the case. An amicus curiae, unless appointed by the Court, is not permitted to participate in oral argument absent leave of the Court.

VII. Oral Argument

A. Allocating Argument Times

How much time will I get for oral argument? When will I find out? May I ask for additional time? In this Circuit, most cases are allocated 15 minutes per side. Fairly straightforward cases may be allocated 10 minutes per side and more complicated cases may be allocated up to 30 minutes per side, though this is rare. Complex cases, depending on the nature of the appeal, may be allocated several hours of argument time.

Counsel are ordinarily sent an order allocating argument time two to three weeks before the argument date. Parties may move to expand or reallocate argument time; however, such motions are rarely granted.

Will the Court allocate rebuttal time? Ordinarily, the Court will not allocate rebuttal time. Counsel must reserve that time at the outset and subtract it from the opening argument.

How do I get a transcript or copy of an oral argument tape? Transcripts of oral arguments may be obtained by submitting a written request to the Court. They may also be requested from the intake counter in the Clerk's Office (Room 5423). If the oral argument has not been previously transcribed, you will be directed to contact the private reporting company authorized to transcribe the Court's oral argument tapes. You may then place your order directly with the reporting company. It will arrange to pick up the tapes from the Court, transcribe them and deliver them to you. You are responsible for paying the reporting company directly for the transcripts. Current transcription rates are $1.94 per page of transcribed material delivered to you within seven business days. Faster service is available at slightly higher prices. If the oral argument has been previously transcribed you may have it photocopied at $.20 per page ($5.00 minimum)

by the commercial copy service authorized to photocopy court documents. Normal turnaround time for photocopying services is 24 hours.

Copies of oral argument tapes may be purchased in cases that are completely closed, i.e., all appeals, remands, and other further proceedings have concluded. Please note, however, that the Court only retains argument tapes for 2 years after the case has been closed. Further information on ordering recordings may be obtained from the Clerk's Office.

VIII. Deciding the Appeal

A. Timing

How soon after argument will the appeal be decided? The average time from argument to termination for cases argued during the 2001-2002 term was 68 days. The Court attempts to dispose of all the cases argued during a term before the beginning of the next term.

B. Methods of Disposition

1. Published v. Unpublished

Will the disposition of my case be made in a published opinion? The criteria for publication are set out in D.C. Cir. Rule 36. If counsel believes that an unpublished disposition meets one or more of the criteria contained in Rule 36, a motion to publish may be filed within 30 days after judgment. Such motions are rarely granted.

IX. Post-Judgment Review

A. Formal Requirements

1. Petitions for rehearing

When should I file my petition for rehearing? Pursuant to D.C. Cir. Rule 35(a), petitions for rehearing must be filed within 30 days after entry of judgment, unless the United States or an agency or officer thereof is a party, in which case the petition must be filed within 45 days of judgment. Parties should be aware that very few petitions for rehearing are granted.

How many copies should I file and how long may my petition for rehearing be? The Court requires an original and four copies of a petition for panel rehearing. Petitions for rehearing may not exceed 15 pages.

Can I file a response to a petition for rehearing? If the Court wishes a response to a petition for rehearing it will enter an order to that effect. Otherwise, no responses will be received. The Court will not ordinarily grant rehearing without a response.

Does my petition for rehearing stay the Court's mandate? Yes, the mandate is stayed until seven days after the disposition of any timely petition for rehearing. *See* Fed. R. App. P. 41(d)(1); D.C. Cir. Rule 41(a).

2. Petitions for rehearing en banc

When should I file my petition for rehearing en banc? Petitions for rehearing en banc are rarely

granted. Counsel should carefully consider whether the petition meets the criteria set out in Federal Rule of Appellate Procedure 35(a), i.e., whether "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or whether " the proceeding involves a question of exceptional importance." The same time limits as are applied to a petition for panel rehearing apply to a petition for rehearing en banc. If the United States or an agency or officer thereof is a party, then the petition must be filed within 45 days of judgment. All other petitions must be filed within 30 days of the judgment.

How long may my petition be and how many copies must I file? An original and nineteen copies of a petition for rehearing en banc must be filed. The petition for rehearing en banc may not exceed 15 pages.

What if I combine my petition for panel rehearing with my petition for rehearing en banc? A combined petition for panel rehearing and rehearing en banc may not exceed 15 pages. An original and nineteen copies of the combined petition must be filed.

Does a petition for rehearing en banc stay the mandate? Yes. *See* Fed. R. App. P. 41(d)(1); D.C. Cir. Rule 41(a).

May I file a response to a petition for rehearing en banc? Not unless the Court requests that a response be filed.

What happens if the Court decides to rehear my case en banc? Usually, the Court will schedule

argument and often will order supplemental briefs limited to a specific issue or issues. Ordinarily, the judgment of the Court issued by the original panel, but not the panel's opinion, will be vacated. Once the en banc Court decides the case, a new judgment is entered. An evenly split Court results in affirmance of the decision under review.

Once the en banc Court enters a new judgment, when does the mandate issue? Seven days after the entry of judgment.

3. Issuance of the Mandate

When will the mandate issue in my case? Ordinarily the mandate issues seven days after the time for filing a petition for rehearing has passed. If a petition for rehearing is filed, the mandate issues seven days after the disposition of the petition for rehearing.

What if I wish to have the issuance of the mandate stayed pending an application to the Supreme Court for a writ of certiorari? Federal Rule of Appellate Procedure 41 and D.C. Circuit Rule 41 set out the procedures for obtaining a stay of the mandate pending an application for a writ of certiorari. If a party does file an application for writ of certiorari while the mandate has been stayed, the stay will continue until the Supreme Court disposes of the application.

X. Costs

What are costs and how much can I request? Reimbursement of costs is allowable to a prevailing party

pursuant to Federal and Circuit Rules 39. The only costs available on appeal are the docketing fee and the costs of printing or otherwise physically preparing the briefs. Secretarial and other overhead expenses are not allowable. Costs can only be claimed on the form furnished by the Clerk and must be submitted within 14 days of judgment. The Clerk conducts a periodic survey of the rates charged by local printers for the various services and determines the average charge. This average becomes the allowable amount of reimbursement for the next year. The schedule of allowable costs is published on the Court's web site, and is also available from the Clerk's Office.

XI. Appointment of Counsel

A. In Criminal Cases

1. Making the appointment

How are counsel appointed in criminal appeals? Representation in criminal matters is governed by the Criminal Justice Act ("CJA"). Pursuant to that Act, the Court maintains a list of attorneys eligible for appointment. Selection to the list is made by a Committee of the Court, but the list and applications are managed by the Federal Public Defender. Application should be made through that office. The Federal Public Defender makes the actual assignments from the list. *See Handbook* at 25-26.

2. Compensation

When can I expect payment of my CJA voucher? The Criminal Justice Act, the implementing regulations, and this Court's CJA Plan require several review steps to ensure that appointed counsel have complied with the Act, and that the amount of compensation requested is justified. Vouchers are reviewed

by the Court of Appeals Clerk's Office for accuracy and to ensure that supporting documentation is adequate. In addition, a substantive recommendation on the merits of the claim is submitted to the reviewing judge (either the presiding judge of the panel that decided the appeal, or the author of the Court's opinion). Once the reviewing judge has made a determination of the amount of compensation warranted, the voucher is returned to the Clerk's Office for payment. If the total claim exceeds the maximum permitted by the Act (currently $3,700 for an appeal), however, the Chief Judge must also approve the claim before payment.

Although each person involved in processing and review of vouchers endeavors to complete the process expeditiously, the number of steps required, and the press of other duties, may add to the time between submission and payment. Once technical review is complete, a voucher is usually processed for payment within two weeks.

What can I do to expedite review and payment of my voucher? Delays sometimes occur because counsel do not, in the first instance, provide full documentation and support for the hours or expenses claimed. Counsel should be thoroughly familiar with the requirements contained in the CJA Guidelines and this Court's CJA Plan.

Payment may also be delayed because of this Court's policy of holding vouchers in consolidated cases, or cases in which successor counsel have been employed, until all vouchers of all attorneys have been submitted. Counsel should be mindful in such cases that tardiness on their part may have a negative effect on their colleagues, and should strive to submit all vouchers in a timely fashion. The Court may reduce payment of tardy claims, or even deny payment altogether.

If application of the Court's policy works an unusual hardship on an attorney whose representation is complete, he or she may submit to the Court a motion for interim compensation. If granted, counsel will receive at least partial payment of the approved claim; the remainder (usually one-third) will be withheld until the conclusion of the case.

B. In Civil Cases

1. Making the Appointment

How are counsel appointed in civil cases? For civil appointments, counsel should send a letter of interest, with attached resume, to the attention of the Deputy Special Counsel to the Clerk. Counsel will always be contacted to determine availability before an appointment is made.

2. Compensation

Is there compensation for Court-appointed counsel in civil cases? No compensation is available for counsel who agree to be appointed in civil cases.

XII. Judicial Misconduct Complaints

How do I file a disability or misconduct complaint against a judge of the Court of Appeals? If you believe that a judge of the D.C. Circuit has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts," or that the judge "is unable to discharge all the duties of office by reason of mental or physical disability," 28 U.S.C. § 351(a), you may file a complaint setting forth your allegations. The complaint must be filed on a form available from the Court of Appeals

Clerk's Office. Before filing a complaint, you should review the procedural and substantive provisions in the Circuit's Rules Governing Complaints of Judicial Misconduct or Disability. The Rules are available from the Clerk's Office; they are also widely published -- for example, in the United States Code Annotated, and on the Court's Internet site.

How will my complaint be processed? A complaint in proper form will be transmitted to the Chief Judge for initial review. The Chief Judge may dismiss the complaint if it is determined that the conduct alleged is not a proper subject for investigation, that the allegations are frivolous, if the problem raised has been corrected, or if intervening events have rendered further action unnecessary. Otherwise, the Chief Judge will appoint a committee of judges to investigate the allegations, and to report to the Circuit Judicial Council. The Council then has ultimate responsibility for deciding what action, if any, is appropriate. The final decisions of the Chief Judge and the Judicial Council are in some limited circumstances subject to further review.

XIII. Attorney Admissions and Discipline

Do I need to be a member of the Court's bar to file papers with the Court? As a general rule, all papers filed with the Court must be signed by at least one member of the Court's bar. *See* D.C. Cir. Rule 46 and *Handbook* at 6, for exceptions to this requirement.

Do I need to be a member of the Court's bar to argue a case before the Court? Yes, although the Court may allow an attorney to appear *pro hac vice*, one time only, to present oral argument. *See* D.C.

Cir. Rule 46(a); *Handbook* at 6.

How do I gain admission to the Court's bar? An attorney admitted to the highest Court of a state or to the bar of another federal Court of Appeals or District Court may be eligible for admission and can apply by completing the form supplied by the Clerk and submitting it along with a certification of membership and good standing from the qualifying bar, and the requisite fee. *See* D.C. Cir. Rule 46(b); *Handbook* at 6-7.

What happens if a question arises about an applicant's fitness for admission? The Court may refer the matter to its Committee on Admissions and Grievances for a recommendation. *See* D.C. Cir. Rules, App. II, Rule II(c).

What standards of professional conduct apply to me while litigating before the Court? The disciplinary rules adopted by the District of Columbia Court of Appeals. *See* D.C. Cir. Rules, App. II, Rule I(b).

What are the Court's procedures for investigating allegations of attorney misconduct? The Court may refer to its Committee on Admissions and Grievances any accusation or suggestion of misconduct for investigation and recommendation. *See* D.C. Cir. Rules, App. II, Rule II(d). If the Committee finds that misconduct occurred, the Court will issue an order directing the attorney to show cause why discipline should not be imposed. If the allegations of misconduct are sustained, the Court may reprimand, suspend, disbar, or impose other discipline. *See* D.C. Cir. Rules, App. II, Rule II(g). The Court's procedures for

attorneys convicted of crimes or disciplined in other jurisdictions are slightly different, but usually also involve a show cause order and a referral to the Committee on Admissions and Grievances. *See* D.C. Cir. Rules, App. II, Rules III, IV, and V.

XIV. Advisory Committee on Procedures

What is the Court's Advisory Committee on Procedures? The Committee is constituted, pursuant to 28 U.S.C. § 2077(b), to assist the Court's evaluation of its procedures. The Committee both initiates recommended changes to the Court's local rules and Handbook, and comments on changes proposed by the Court. The Committee also serves as a liaison between the Court and the bar and public. *See* D.C. Cir. Rule 47.4; *Handbook* at 5.

Who sits on the Advisory Committee? The Committee is composed of at least 15 attorneys who represent a broad cross-section of the federal bar. The Court selects the members, who serve for staggered three-year terms. *See* D.C. Cir. Rule 47.4; *Handbook* at 5. The Chief Judge designates a member of the Court to act as the Court's liaison to the Committee. If you are interested in an appointment to the Committee, contact the Clerk of Court or the Committee Chair.